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Supreme Court of the United States

OCTOBER TERM, 1954

No. 53

UNITED STATES OF AMERICA,
Appellant,

v.

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., a corporation of New York; INTERNATIONAL BOXING CLUB, a corporation of Illinois; MADISON SQUARE GARDEN CORPORATION, a corporation of New York; JAMES D. NORRIS; and ARTHUR M. WIRTZ,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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Appellees, International Boxing Club of New York, Inc. and Madison Square Garden Corporation, and appellees, International Boxing Club, Inc., James D. Norris and Arthur M. Wirtz, although represented by separate counsel, for the convenience of the Court have joined in this brief urging affirmance of the dismissal below.

Opinion Below

The District Court did not render a written opinion. At the conclusion of argument on appellees' motion to

dismiss the complaint, the Court granted the motion on the authority of the decision in *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356, *rehearing denied*, 346 U. S. 917 (1953), on which the motion was based (R. 10, 11). The statements which the Court made in announcing its ruling were not transcribed.

Question Presented

Whether, in view of the holdings in *Federal Baseball Club of Baltimore, Inc.* v. *National League of Professional Baseball Clubs*, 259 U. S. 200 (1922) and the *Toolson* case—that Congress had no intention of including the business of baseball within the scope of the federal antitrust [illegible]s—there is any basis for the imputation of a contrary intent to Congress with respect to the analogous occupation of promoting and exhibiting professional championship boxing contests, an activity which, as in the case of baseball, includes, as one of its incidents, the sale of radio, television and motion picture rights thereto.

Statement

Background of the Litigation Affecting Professional Sports

The decision in *Federal Baseball Club of Baltimore, Inc.* v. *National League of Professional Baseball Clubs*, 259 U. S. 200 (1922) had been the law for more than twenty-five years before its continuing validity was challenged for the first time in the decision by a divided court in *Gardella* v. *Chandler*, 172 F. 2d 402 (C. A. 2, 1949). The opinions in that case, one of which cast considerable doubt on the

continued vitality of the *Federal Baseball* case (172 F. 2d 402 at p. 409), led to the filing of additional treble damage actions against baseball.[1]

The filing of the complaint in the instant case, in March, 1952, was preceded by a grand jury investigation. Shortly before the commencement of this case, an action was filed by the Government against the National Football League, limited, however, to restrictive agreements among the club owners relating solely to radio and television broadcasts.[2] The institution of those actions apparently represented the first attempts by the Government to obtain a judicial determination that the *Federal Baseball* decision was no longer the law and also the first instance in which the Government, since the passage of the Sherman Act in 1890, had instituted any action claiming that the conduct of athletic contests, professional or amateur, were within the ambit of the antitrust laws.

In filing the complaint herein, the Government no doubt considered the fact that if this Court were to hold that the promotion of boxing matches—which are individual contests of physical skill conducted under close supervision by state or local governmental regulatory bodies—was intended by Congress to be within the antitrust laws, all organized sports, including baseball, could ultimately be brought within them. That would result from the simple process of argu

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[1]House Report 2002, 82nd Congress, 2nd Session, submitted May 27, 1952, (cited by the Government in a number of places in its brief and hereinafter called the Report) at p. 1-2 refers to the fact that the bills introduced to exempt organized professional sports from the antitrust laws had been prompted by the existence of eight suits against organized baseball asking damages totaling several millions of dollars.

[2]See *United States* v. *National Football League*, 116 F. Supp. 319 (E. D. Pa. 1953). The time for appeal from the decision in that case has expired. Appellees do not regard this case as apposite here, and we note that it is not referred to in the Government's brief.

ment from the lesser to the greater and the application of the doctrine of *stare decisis,* without the possible embarrassment of a frontal attack upon the national pastime of baseball and the decision of this Court in the *Federal Baseball* case.

Before the instant case had proceeded beyond joinder of issue, writs of certiorari were granted by this Court in the *Toolson* and companion cases and those cases were argued at the October, 1953, Term. This Court, in its decision, reaffirmed the continuing validity of the *Federal Baseball* decision.

The Court's decision in the *Toolson* case was applied as a controlling precedent by the District Court in this case. It has been similarly applied by other courts in cases involving boxing, which cases will be hereinafter discussed, as well as by Judge Knox, of the Court below in *United States* v. *Shubert,* 120 F. Supp. 15 (S. D. N. Y. 1953), a case concerning professional theatrical productions which, by request of appellant, is to be argued here immediately prior to this case.

Professional sports in general and boxing and baseball in particular are sufficiently similar, as will be more fully developed below, to require, under the doctrine of *stare decisis* and related considerations, that the *Federal Baseball* and *Toolson* cases be applied to the entire field of sports, thus making it unnecessary for us to discuss the application of these decisions in any other field.

The Complaint

International Boxing Club of New York, Inc. (I. B. C. (N. Y.)) is a New York corporation licensed by the New York State Athletic Commission to promote boxing con-

tests in the State of New York (R. 1)[3] Madison Square Garden Corporation owns 80% of the stock representing the substantial financial interest in I. B. C. N. Y. (R. 2-3). International Boxing Club, Inc. (I. B. C. Ill.) is an Illinois corporation licensed to promote boxing contests in that State (R. 1).[4] Messrs. Norris and Wirtz own 80% of the stock representing the substantial financial interest in I. B. C. Ill. (R. 2-3). I. B. C. N. Y. and I. B. C. Ill. have a common set of directors and the voting power of their stock is divided so that Madison Square Garden, Wirtz and Norris have approximately 80% and Joe Louis Barrow, the former heavyweight champion, has approximately 20% (R. 2-3).

The further allegations are (R. 5-8) that through stock ownership, leases and agreements, the appellees have the exclusive right to lease for the promotion of professional boxing contests two outdoor stadia and five indoor arenas in New York, Chicago, Detroit and St. Louis which, according to the appellant, are the principal arenas where championship contests can be successfully promoted[5]; that through the employment of so-called "return match"[6] and "exclusive service"[7] contracts, coupled with control of the

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[3]Under New York law, only a domestic corporation can be licensed to promote boxing matches. N. Y. Unconsol. Laws § 9108(1) (1953), 1920 Session Laws Ch. 912.

[4]Illinois law, like New York law, requires the existence of a domestic corporation for the issuance of a license to promote boxing. Ill. Rev. Stat. Ch. 10 4/5, § 12 (1953).

[5]This allegation of the complaint contrasts sharply with the statement in the brief of the *amicus curiae* here (pp. 3, 4) that there are "suitable arenas in most of the important cities".

[6]Return match contracts provide that if the contender, in a championship boxing contest, should win, thereby gaining recognition as champion, he will engage in a return bout with the former champion, thereby giving the latter an opportunity to regain the title.

[7]Exclusive service contracts provide that the boxer in question will, during a specified period, engage only in boxing contests promoted by the other contracting party, except with the consent of such party. Provisions relating to exclusive services are sometimes in-

above mentioned stadia and arenas, 19 out of the 21 professional championship boxing contests presented in the United States between June, 1949 and March, 1952 were promoted[8] by appellees or with the participation of appellees; and that it follows that defendants have a monopoly of the promotion of professional championship boxing contests and certain "by-products" thereof, namely, the sale of radio, television and motion picture rights thereto. It is appropriate to note here that the allegations of the complaint relating to the monopoly of appellees, and the effects thereof, particularly with respect to radio and television, are considerably less comprehensive than those contained in the *Toolson* case with respect to baseball.[9]

SUMMARY OF ARGUMENT

The appellees find no basis in the *Toolson* re-affirmation of the *Federal Baseball* decision for the supposition that this Court gave, or imputed to Congress an intent to give, to professsional baseball—the largest, most highly organized and most widespread professional sport in the United States—a special immunity which was to be denied to those conducting other professional sports of similar character but of lesser stature. When this Court has found, as it did in the *Toolson* case, that Congress did not intend to

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cluded in "return match" contracts. As shown by the *Toolson* case, the analogous exclusive rights of one baseball team to the services of its players is the foundation of the whole structure of organized baseball.

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[8]The promotion of a boxing contest involves in essence, as indicated by the complaint (par. 13, R. 4), contractual arrangements with the two boxers involved in the principal contest, arranging for the locale of the contest, arranging the preliminary contests, and, where sufficient interest exists, the sale of radio, television, motion picture or other rights to the contest.

[9]See *Toolson* record, pp. 8, 12-14, 36-40.

include one sport within the antitrust laws, and it is clear that other sports have received no intimation that Congressional intent as to them might be different, fair administration of principles of stability of the law is called for. That requires that the logical implications of the decisions of this Court with respect to baseball should not be disregarded and other sports suddenly subjected to the chaos, litigation and confusion which baseball would have faced had this Court elected in the *Toolson* case not to adhere to its prior decision.

The Government's entire argument depends upon the novel theory that when this Court, in the *Toolson* decision, reaffirmed the continuing validity of the *Federal Baseball* case, it somehow limited the former prospectively and deprived the latter retrospectively of their normal roles as precedents except in the specific instance of professional baseball. Appellant urges, in effect, that the applicability of *stare decisis* to these particular decisions is dependent upon a showing equivalent to that necessary to establish a specific estoppel, a restriction which is alien to the fundamental concept of *stare decisis*.

ARGUMENT

I

THERE IS NO MORE BASIS FOR THE IMPUTATION TO CONGRESS OF AN INTENT TO BRING THE PROMOTION AND EXHIBITION OF PROFESSIONAL CHAMPIONSHIP BOXING CONTESTS WITHIN THE SCOPE OF THE FEDERAL ANTITRUST LAWS THAN THERE WAS AS TO BASEBALL.

Our basic argument is that since professional boxing is and always has been indistinguishable from professional

baseball, in all material aspects of the manner in which it is conducted, the decisions relating to professional baseball must be treated as governing professional boxing.

The basis of this Court's decision in the *Toolson* case was that "Congress had no intention of including the business of baseball within the scope of the Federal antitrust laws". (346 U. S. 356, 357) Professional boxing, like professional baseball, involves a contest of strength and skill; each boxing bout, like each baseball game, is unique and will never be duplicated even as to ultimate outcome, despite the fact that the same contestants may meet more than once. Boxing, however, obviously does not have and never has had as many interstate contacts as professional baseball, which requires, at least in the major leagues, planned interstate movement of teams to fulfill the annual schedule, southern spring training camps, a gradual northern trek of the teams in the early spring, hundreds of players from literally every state and many from foreign countries and a huge movement of equipment and supplies of all sorts.[10]

Boxing is by comparison a minor sport. The Report (p. 90), while ignoring boxing completely, gives attendance receipts for various forms of "spectator amusements", including professional baseball, football, hockey, horse and dog tracks, and college football. The comparable figures for boxing (R. 5), show that boxing as a whole, and championship boxing in particular, are poor relations. In a thirty-three month period (1949-1952) (R. 5) boxing is alleged to have drawn $15,000,000 overall, and championship boxing only $4,500,000. Professional baseball in only two of the same years (1949 and 1950) drew over $121,-

[10]The Report (pp. 4-7) discusses at length the interstate aspects of baseball and concludes (p. 7) that "Congress has jurisdiction to investigate and legislate on the subject of professional baseball."

000,000, professional football almost $17,000,000, and professional hockey $14,000,000, while college football and other amateur spectator sports were drawing $208,000,000 and $115,000,000 respectively.

The relationship of radio and television to boxing has been precisely the same as to baseball (as this Court considered it in the *Toolson* case) and to other types of athletic contests.[11] The public interest in the result, which is the nub of an athletic contest, has always placed a premium on the speed of disseminating information as to the progress of the contest. Prior to the advent of radio or television, for example, there existed telegraphic play-by-play reports of baseball games, the use of which was noted by Judge Chase in his opinion in the *Gardella* case, 172 F. 2d 402, 404 (C. A. 2, 1949)[12] We emphasize this point, because the complaint here, and appellant's brief, by constant reference to radio, television and motion picture revenues, attempts to create the impression that boxing differs from baseball and other sports in its dependence on these sources of revenue. It is evident, however, that boxing, like all other sporting events which require no expensive rehearsal and which are the subject of widespread public interest, is and always has been a natural subject for radio, television or motion pictures. Appellant's brief cites (footnote, p. 5) a 1953 heavyweight

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[11]Motion pictures, which necessarily lack the element of suspense as to outcome, are of lesser significance than radio and television both to baseball and boxing and usually involve an edited version of the original, concentrating on the more dramatic bits of action. As to both baseball and boxing, however, the sale of the right to take and distribute motion pictures is a possible source of revenue which is availed of from time to time.

[12]Appellant's brief, footnote p. 19, recognizes the existence of this particular "by product" of baseball but attempts to minimize its significance. It must be recognized, however, that such reports were representative of the most advanced methods of communication in the era of which we are speaking and were as significant then as radio and television broadcasts are now.

championship contest in which gate receipts were less than those from radio, television and motion pictu.e rights. Comparable allegations were made in the *Kowalski* and *Corbett* cases (companion cases to the *Toolson* case before this Court) with respect to All Star game and 1950 World's Series receipts (*Kowalski* complaint pars. 31, 32, Oct. 1953 Term, No. 23; *Corbett* complaint pars. XXI, XXII, Oct. 1953 Term, No. 25).

The analogy between boxing and baseball is such that Congress, not having intended (as this Court stated in the *Toolson* case) to include baseball within the scope of the antitrust laws, cannot logically be said to have had a contrary intent as to boxing. Man to man conflict, which is the essence of modern boxing, antedates baseball by many hundreds of years; indeed, its genealogy may be traced back through the Roman gladiator to the Old Testament story of David and Goliath. John L. Sullivan was the recognized heavyweight champion when the Sherman Act was adopted. Congress, in 1890, must be deemed to have been quite as aware of the existence of boxing as it was of the existence of baseball. There is no rational basis for imputing to Congress an intent to have the words of the Sherman Act exclude baseball while at the same time intending that the same statutory words should include boxing or any other sport.

Every court which has had to consider the question since the *Toolson* case has found that boxing is indistinguishable from baseball. That was the view not only of the Court below, after full presentation of the arguments, but also of the District Court of the United States for the Northern District of Illinois, Eastern Division in *Peller* v. *International Boxing Club et al.*, (Civil No. 52 C 813, 1954) and by the same Court, affirmed by the Court of Appeals, in

Shall v. *Henry*, 211 F. 2d 226 (C. A. 7, 1954). In the *Shall* case, Judge Lindley said (at p. 229):

> "* * * Those decisions [*Federal Baseball* and *Toolson*] must control unless there is some significant legal distinction between the business of promoting and producing boxing bouts at various places in the United States and that of professional baseball.
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> * * *
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> We agree that a professional boxing contest is not to be distinguished legally from that of a professional baseball game. Obviously each involves a contest of physical skill and endurance taking place in a particular locality. The success of each depends upon the support of the public in the purchase of tickets and the sale of radio and television rights. Each baseball game is unique; no two are exactly alike. Each boxing contest is unlike any other. The profitable promotion of each depends upon the same elements. Under the mandate of the Supreme Court, therefore, we must hold that it was not the intention of Congress to extend the provisions of the Anti-Trust laws to athletic contests such as those involved in boxing."

Commentators also reflect the opinion that all sports are on a common ground, so far as the antitrust laws are concerned. For example, in (1949) 17 *U. Chi. L. Rev.* 56, at p. 77, it was said "All professional sports, because of the problems common to all, have adopted systems similar to that under which 'organized baseball' operates". See also, (1949) 58 *Yale L. J.* 691 at pp. 702, 703.

Such judicial opinion and comment mirrors the opinion of the legal profession that the law applicable to baseball would be applied, without any question, to all other professional sports. The position of appellant here would

involve a retrospective and logically unfounded diminution of the value of a precedent which, except for doubts expressed in one opinion in the *Gardella* case and proved by the *Toolson* case to be erroneous, has been firm for many years.

II

SINCE THERE IS NO VALID DISTINCTION BETWEEN PROFESSIONAL BASEBALL AND PROFESSIONAL BOXING THE DOCTRINE OF *STARE DECISIS* SHOULD BE APPLIED.

The arguments of the Government, which will be discussed in detail below, attempt to limit the *Federal Baseball* and *Toolson* decisions to their own facts. These arguments do not, however, present any reasons why these cases should be so limited, contrary to the generally accepted principle that judicial pronouncements, especially those of this Court, are to be applied to other situations than the precise one in which the pronouncement was made.[13]

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[13]Members of this Court, on various occasions and in varying contexts, have indicated their awareness that the decisions in a particular case would be applicable to other situations, *e.g.*:

> "As these tax decisions *may have an influence on subsequent decisions beyond the limited area of the issues decided,* I have thought it advisable to state my position for whatever light it may throw * * *" (Mr. Justice Reed in, Comm'r. v. Estate of Church, 335 U. S. 632, 651 (1949) (emphasis supplied).

> "* * * But sometimes *the path that we are beating out by our travel is more important to the future wayfarer* than the place in which we choose to lodge." (Mr. Justice Jackson in, First National Bank v. United Air Lines, 342 U. S. 396, 398 (1952) (emphasis supplied).

> "We are framing here a rule of evidence for criminal trials in the federal courts. That rule must be drawn in light not of the particular case *but of the system which the particular case reflects.* * * *" (Mr. Justice Douglas in, United States v. Carignan, 342 U. S. 36, 47 (1951) (emphasis supplied).

This Court, in *Screws* v. *United States*, 325 U. S. 91 (1945), has recently enunciated the criteria by which a precedent is to be evaluated. The Court said (at p. 112 of 325 U. S.):

> "But beyond that is the problem of *stare decisis*. The construction given § 20 in the *Classic* case formulated a rule of law which has become the basis of federal enforcement in this important field. The rule adopted in that case was formulated after mature consideration. It should be good for more than one day only. We do not have here a situation comparable to *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96, where we overruled a decision demonstrated to be a sport in the law and inconsistent with what preceded and what followed. The *Classic* case was not the product of hasty action or inadvertence. It was not out of line with the cases which preceded. It was designed to fashion the governing rule of law in this important field. We are not dealing with constitutional interpretations which throughout the history of the Court have wisely remained flexible and subject to frequent reexamination. The meaning which the *Classic* case gave to the phrase 'under color of any law' involved only a construction of the statute. Hence if it states a rule undesirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we revise the meaning of § 20 to meet the exigencies of each case coming before us."

The applicability of the foregoing language to this case is immediately apparent. Whether baseball or boxing is within or without the Sherman Act is a question of statutory construction rather than constitutional law; this Court has so recognized in the *Toolson* case, where the basis was Congressional intent. The *Federal Baseball* case was the

product of mature consideration and had the result of settling the law for a period of many years, during which Congress had ample opportunity to act had it been so inclined.

Appellant's first argument urging the inapplicability of the *Toolson* case decision is that "the *Federal Baseball* case held only that baseball was not subject to the Sherman Act. It did not hold * * * that boxing is similarly exempt." (Gov. Br., p. 12.) But the natural implications of a precedent which stood for a generation before it was reaffirmed ought not to be sloughed off so cavalierly. This is especially so when, as here, the case at issue is indistinguishable from the precedent.[14] The extension and growth of case law is dependent upon recognition of the logical implications of prior decisions.[15]

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[14]The rationale of the *Federal Baseball* case, as set forth in the opinion of the Court of Appeals which it affirmed, can, with the change of a very few words, be in terms applied to boxing: "The business in which the appellants were engaged, as we have seen, was the giving of exhibitions of baseball [boxing]. A game of baseball [boxing] is not susceptible of being transferred. The players [contestants], it is true, travel from place to place in interstate commerce, but they are not the game [bout]. Not until they come into contact with their opponents on [in] the baseball field [ring] and the contest opens does the game [bout] come into existence. It is local in its beginning and in its end. Nothing is transferred in the process to those who patronize it. The exertions of skill and agility which they witness may excite in them pleasurable emotions, just as might a view of a beautiful picture or a masterly performance of some drama; but the game [bout] effects no exchange of things according to the meaning of 'trade and commerce' as defined above." (269 Fed. 681, at pp. 684, 685).

[15]In *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953), where the facts were not as close to the precedent relied upon as they are in this case, the court, in affirming a judgment that a carpenter employed by an independent contractor had obtained against the owner of the vessel because of the unseaworthiness of the ship or its appliances, said at pages 412-413:

> "We are asked to reverse this judgment by overruling our holding in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85. Sieracki,

Appellant next argues (Gov. Br., pp. 12, 13) that "there has been no showing that boxing did in fact rely" on the *Federal Baseball* case to the same, or a comparable, degree as did baseball. This alleged lack of a "showing", with its implication of failure of factual proof, introduces another limiting element into the doctrine of *stare decisis*. This is a rather startling theory; it would seem to ban reliance on precedent except by those who can adduce evidence sufficient to warrant a finding in the nature of an estoppel. Legal argument would then not be confined to precedents, as is now the case, but would in effect involve an appellate court in a trial of the factual justification for the citation of each precedent. Stability in the law would decline and each case would tend to become a legal transient. The most ancient and respected precedents would be the hardest to support

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an employee of an independent stevedoring company, was injured on a ship while working as a stevedore loading the cargo. We held that he could recover from the shipowner because of unseaworthiness of the ship or its appliances. We decided this over strong protest that such a holding would be an unwarranted extension of the doctrine of seaworthiness to workers other than seaman. That identical argument is repeated here. We reject it again and adhere to *Sieracki*. We are asked, however, to distinguish this case from our holding there. It is pointed out that Sieracki was a 'stevedore'. Hawn was not. And Hawn was not loading the vessel. On these grounds we are asked to deny Hawn the protection we held the law gave Sieracki. These slight differences in fact cannot fairly justify the distinction urged as between the two cases. Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law."

because of the difficulty of excavating proof of reliance in support of practices long followed. By the same token, recent decisions would be valueless because they would not have had time to acquire the patina of reliance which the Government here contends is prerequisite to citation as precedent. It is unnecessary to labor further the undesirability of hobbling *stare decisis* in this way.

The only authority cited by appellant in support of this argument is *Helvering* v. *Hallock, et al.*, 309 U. S. 106 (1939). But this case does not make reliance the measure of the dignity of precedents. It was mentioned there only to show that fealty to the newest decision was not required by considerations of fairness. It involved a conflict of precedents, with the Court rejecting the taxpayer's assertion that it should consider itself constrained by these latest decisions, which departed somewhat from earlier ones. The Court said (at page 119 of 309 U. S.):

> "We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.
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> Nor have we in the *St. Louis Trust* cases rules of decision around which, by the accretion of time and the response of affairs, substantial interests have established themselves. No such conjunction of circumstances requires perpetuation of what we must regard as the deviations of the *St. Louis Trust* decisions from the *Klein* doctrine. We have not before us interests created or maintained in reliance on

> those cases. We do not mean to imply that the inevitably empiric process of construing tax legislation should give rise to an estoppel against the responsible exercise of the judicial process. But it is a fact that in all the cases before us the settlements were made and the settlors died before the *St. Louis Trust* decisions."

No similar problem exists here. The decision in the *Toolson* case clearly demonstrates that the *Federal Baseball* case meets every test of a valid precedent, and it should be followed here without any special requirement of a novel "showing" as to the extent to which there might have been actual reliance thereon. *Toolson* itself, moreover, indicates that reliance is to be presumed; the Court there noted that baseball had been "* * * *left* for thirty years to develop on the understanding that it was not subject to existing antitrust legislation * * *." *Toolson* v. *New York Yankees,* 346 U. S. 356, 357 (emphasis supplied).[16]

Appellant's following and related argument (Gov. Br., pp. 13, 14), that baseball *in fact* relied on the *Federal Baseball* case while boxing did not, is equally insubstantial. Appellant first states that the development of the

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[16]In *Hollywood Lumber Co.* v. *Love,* 155 Cal 270, 274, 100 Pac. 698, 700 (1909), the highest court of the State of California had occasion to say:

> "The decision in the case of *Williams* v. *Santa Clara Mining Association,* 66 Cal. 200, [5 Pac. 85], was the first one upon the subject after the adoption of the codes. It has probably been generally followed. Attorneys have doubtless advised their clients upon the law there announced, and property rights have been acquired upon the faith of it. * * * For almost a quarter of a century that case has been the leading authority in California upon the interpretation of the statutes now before us. If there were any good reason for a change in the rule with reference to trust-deeds, the legislature has had abundant opportunity for an unequivocal declaration of such change."

"farm system" in baseball shows factually baseball's reliance on the *Federal Baseball* case. This is based on the statement of one witness before the Congressional subcommittee, who was contrasting the present situation in baseball with that existing at the time of the *Federal Baseball* case. This is, however, purely a *"post hoc, ergo propter hoc"* contention. The Report (pp. 44, 45, 62-72) clearly indicates that efforts to establish what is now known as the farm system in baseball occurred as early as 1905 and that the development of the farm system at that time was prevented only by league rules, which were continued in substantially the same form until the depression of the 1930's brought to the minor leagues financial problems which compelled support from the major leagues. Actually, the farm system was not a true "development"[17]; it merely meant a shift in the ownership of already fully developed minor league teams.

In contrast to baseball's alleged reliance on the *Federal Baseball* case, appellant then argues (Gov. Br., p. 14)(1) that boxing "cannot point to any comparable organization which it has created in the past thirty years in reliance on exemption from the Sherman Act"; that (2) "the restrictive practices upon which this suit is based were instituted only five and one-half years ago"; and (3) ends by reiterating the previously noted contention that "there is no evidence that the boxing business has ever relied" upon an authoritative decision of this Court exempting it from the antitrust

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[17]The Report (p. 50) points out that there were "more than 40 minor leagues from 1910-13" as compared with 50 in 1951 (Report p. 50). Thus, the only "development" in baseball has been a slight increase in the number of minor leagues. This development is undoubtedly more attributable to the population increase in the intervening years than to any conscious reliance on the *Federal Baseball* decision.

laws. But for the reasons already stated the doctrine of *stare decisis* makes these contentions irrelevant; that they are also factually erroneous and call for correction points up the twilight zone in which the judiciary would have to move if *stare decisis* were to be limited to those cases in which litigants could establish what amounts to an estoppel against departure from precedent. As to (1) we point out that the Report clearly shows that the organization in baseball, in substantially its present form, existed prior to the *Federal Baseball* case and did not, as appellant implies, develop since that case. In contrast, it is also the fact that boxing has had a tremendous development in popularity during that same period, the basic impetus to which was given by the physical training program of the Army in World War I. Thus the argument that baseball relied, while boxing did not, appears to be based on factual misconceptions. Appellant's argument (2), that appellees' alleged restrictive practices are new, is equally unfounded. Leases on arenas suitable for boxing contests have for many years been a prerequisite to obtaining a license from the appropriate athletic commission to promote matches (See, e.g., N. Y. Unconsol. Laws § 9108(2) (1953), 1920 Session Laws. Ch. 912). Exclusive service contracts have been known for over thirty years in boxing[18] but have perhaps become more common in recent years. The practices alleged in the complaint, like the similar practices challenged in the *Toolson* case, would strongly indicate reliance on the natural implications for all sports of the *Federal Baseball* case. But this Court ought not to need such aids before applying its earlier decisions as logic requires.

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[18] *Madison Square Garden* v. *Carnera*, 52 F. 2d 47 (C. A. 2, 1931); *Madison Square Garden* v. *Braddock*, 19 F. Supp. 392 (1937); *Reisler* v. *Dempsey*, 173 N. Y. Supp. 212 (Sup. Ct., N. Y. Co. 1918, not officially reported).

Appellant then argues (Gov. Br., pp. 14, 15) that Congress gave extensive consideration in 1951 to "whether baseball should be exempt from the antitrust laws," but gave no consideration to whether boxing should be so exempted. Appellant's brief (p. 15) shows, however, that the bills which prompted the consideration covered "organized professional sports enterprises" and were not limited to baseball. The Report itself gives the basic reasons which led the Committee to lay the emphasis of its consideration of these bills on an investigation of baseball.[19] Other reasons suggest themselves or are also indicated (See Report, pp. 7-12)—for example, baseball is the "national pastime", is regarded of sufficient importance so that the presence of the President of the United States is required to inaugurate each major league season, and is, from the point of view of participants, spectators, receipts and national newspaper coverage by far the most important professional sport. The Committee hearings, moreover, show that they were not limited to baseball; both professional hockey and professional basketball received attention (Congressional Hearings, Organized Baseball, pp. 1454, 1504-5). The Congressional refusal to act cannot fairly be regarded as reflecting an intention to continue an immunity for baseball but to end it for other sports.

Other aspects of appellant's argument contrasting baseball and boxing can be disposed of more briefly. The statement for example (Gov. Br., p. 16) that "Championship boxing * * * is conducted on a match to match basis" in effect points up the fact that boxing does not require the planned regular interstate movement of teams and person-

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[19]The Report (pp. 2-3) points out that the bills were introduced by friends of baseball who were concerned by the existence of private lawsuits challenging the structure of baseball under the antitrust laws.

nel which is involved in baseball. This distinction only serves to emphasize that *Federal Baseball* is *a fortiori* when applied to boxing.

Appellant also contrasts (Gov. Br., p. 17) the extensive dislocation of baseball which would be caused by application of the antitrust laws to it, compared with the fact that all this suit seeks to accomplish is "to restore the competitive situation as it existed prior to 1949". While this contrast assumes, without basis in the record or other citation, that the pre-1949 situation was different from that now alleged, it nevertheless seems unlikely that the propriety of the application of the antitrust laws should depend upon such dubious imponderables as the degree of inconvenience which their application will entail. It had not been supposed before that a defendant who could show potential dislocation might be regarded as exempt while one, in a similar case, who could not establish equivalent hardship, should be deemed to be embraced.

We have already pointed out (*supra*, pp. 9-10) that with respect to radio, television and motion pictures, boxing and baseball are in the same position, except that baseball's revenues from these sources are approximately ten times those of championship boxing.[20] The allegation of the complaint (R. 12) that revenues from these sources are on "an ascending curve" has its counterpart in the Report (p. 6) which characterizes radio and television as the "fastest growing source of revenue" for baseball.

In the *Toolson* and its companion cases, the appellants argued at length and devoted many pages in their briefs to

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[20]This is based on a comparison of the figures as to boxing for 33 months given in the complaint (R. 5, 12) with those set forth for baseball for 1950 and 1951 at page 6 of the Report and on prorating the result over the 33 month period.

the propositions (a) that radio and television make baseball interstate commerce and (b) that organized baseball had a monopoly of or imposed illegal restraints upon broadcasting and televising baseball games.[21] Appellant makes substantially the same arguments here. There is, however, no difference in kind between the two sports in this respect; indeed, the only difference is one of degree, in that baseball involves considerably larger sums.

Boxing, like baseball, sells, either to a broadcaster or a sponsor, the right to come in and broadcast the event, by radio or television. Such activities do not put the promoter in the radio, television or motion picture business, any more than the sale of similar rights by a college puts the college in such business.

Appellant's final argument concedes (Gov. Br., p. 22) that a promoter has a monopoly, by right of ownership, of the particular contest he is promoting, but goes on to claim, in effect, that since appellees allegedly control all championship boxing contests, their consequent control of broadcast and motion picture rights thereto somehow adds up to monoply or restraint of the broadcasting, television and motion picture industries, even though such rights are sold, if at all, on a contest-by-contest basis. But it would require some special legerdemain to make the whole add up to more than the sum of its parts. Since for reasons already fully covered, the promotion and exhibition of boxing contests was not intended by Congress to be within the antitrust laws, the sale of radio, television and other rights incidental to the promotion and exhibition of such contests cannot be viewed as reversing that intent for boxing any more than for baseball.

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[21]See, e.g. *Toolson* case; *Petition for Certiorari* and *Brief in Support Thereof*—pp. 2, 4, 5, 6, 7, 12, 18, 22, 23; *Petitioner's Opening Brief on Writ of Certiorari*—pp. 4, 6, 7, 8, 9, 12, 24, 25, 38, 39, 40, 41, 42.

The argument of the New York State Athletic Commission as *amicus curiae* is in effect, a plea for Federal regulation of boxing and, as such, would be more appropriately addressed to Congress than to this Court. In this connection, however, we may note that the Report considered and rejected the idea of similar regulation of baseball. (Report, pp. 230, 231).

In the *Toolson* case, this Court had to choose between preserving the vitality of the doctrine of *stare decisis* in an important field of statutory construction and applying the Sherman Act to a business in which a large part of the American people have a considerable and continuing interest. This Court chose to adhere to *stare decisis,* even to the extent of expressly refusing to re-examine the Sherman Act questions involved. The choice here is not nearly so open and it should be the same. As we have shown, *Federal Baseball* applies to boxing as an *a fortiori* precedent; by the same token, the *Toolson* case is likewise an *a fortiori* precedent here. By reason of fewer interstate contacts and far less public interest and involvement, a decision for the appellant here, after the Court's deliberate choice in *Toolson,* would deal a greater blow to *stare decisis* than would have been the case in *Toolson,* because the countervailing Sherman Act policy considerations cannot be nearly as important in boxing as in baseball.

Conclusion

The judgment of the District Court dismissing the complaint should be affirmed.

Respectfully submitted,

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